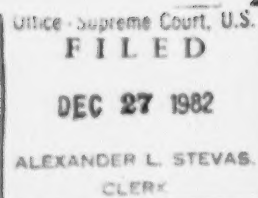


NO. 82-5793



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JIMMY LEE HORTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Georgia Supreme Court properly conducted its statutory sentence review as to proportionality in the present case?

II.

Whether Petitioner's counsel should have been permitted to argue to the jury during the sentencing phase that Petitioner would receive a twenty year sentence without parole on the burglary convictions as a result of being a habitual violator?

III.

Whether imposition of a death sentence under O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) is unconstitutional because such crimes do not reflect a more depraved consciousness on the part of the offender?

IV.

Whether the trial court properly instructed the jury during the sentencing phase in regard to mitigating circumstances?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

During the December, 1980 Term of the Superior Court of Bibb County, Georgia, Petitioner, Jimmy Lee Horton, was indicted for the murder of Willard Don Thompson, the burglary of Sherrell Grant's apartment and burglary of Willie James Griffin's home. The indictment alleged that Petitioner committed these offenses on November 28, 1980. Following a trial by jury, Petitioner was convicted of all offenses; a death sentence was imposed by the jury on the murder conviction and twenty year terms of imprisonment were imposed for each of the burglary convictions.

On direct appeal, the Georgia Supreme Court affirmed Petitioner's convictions and sentences as well as conducting a sentence review as mandated by Georgia statute. See Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982).

PART TWO

SUMMARY OF ARGUMENT

I.

Based on the opinion of the Georgia Supreme Court, it is evident that the Court correctly performed its statutory duty to review each death sentence for the possibility of excessiveness or disproportionality. The similar cases cited by the Georgia Supreme Court in its Appendix, all involved murders during the course of burglaries and had other non-statutory aggravating circumstances analogous to Petitioner's extensive criminal record.

II.

Both the trial court and the Georgia Supreme Court properly precluded Petitioner from arguing to the jury during the sentencing phase that he would receive a twenty year sentence without parole on each of his burglary convictions as a result of his status as a habitual violator under Georgia law. Such an argument is specifically prohibited by Georgia statute and does not constitute a "mitigating circumstance" as defined by this Court.

III.

Imposition of the death penalty pursuant to O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) as it applies to the offense of murder being committed while the offender was also engaged in the commission of a burglary is constitutional. This Court has previously upheld the Georgia statutory scheme for imposition of the death penalty and, therefore, implicitly upheld burglary as an aggravating circumstance.

IV.

The trial court's charge on mitigating circumstances during the sentencing phase of Petitioner's trial was proper and fully complied with the dictates of this Court and various federal appellate decisions. The trial court fully instructed as to the meaning of mitigating circumstances and as to their function in the jury's deliberation on sentencing.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. IMPOSITION OF THE DEATH SENTENCE IN PETITIONER'S CASE IS NEITHER DISPROPORTIONATE NOR EXCESSIVE.

Petitioner contends that the facts of the present case do not reveal "enough aggravation" to warrant imposition of the death penalty. Petitioner also argues that there is no evidence presented of a depraved consciousness on the part of the offender.

The Georgia death penalty statute requires that the Georgia Supreme Court review the proportionality of death sentences to penalties imposed in similar cases:

With regard to the sentence, the court shall determine:

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

O.C.G.A. § 17-10-35(c)(3); Ga. Code Ann. § 27-2537(c)(3).

It is apparent from the opinion of the Georgia Supreme Court in the instant case, that the state tribunal reviewed Petitioner's case in regard to both the factual background underlying the offense and Petitioner's characteristics as an individual. The Georgia Supreme Court noted that in his attempt to escape from the scene of the burglary, Petitioner attempted to kill an unarmed woman and subsequently killed her

companion. In regard to the Petitioner as an individual, the court noted that "Appellant had nine prior felony convictions, including four burglaries, an armed robbery, and an escape. By the time of sentencing, he had amassed three additional felony convictions, two for burglary and one for murder." (footnote deleted). Horton v. State, supra, 249 Ga. at 881.

Respondent maintains that the cases cited by the Georgia Supreme Court in its Appendix to the opinion, indicate substantially similar fact situations where a death penalty was imposed. Petitioner points to Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975) in which the death sentence was vacated by a federal district court. See Moore v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981). The facts in Moore were unique because the death sentence was imposed by a judge who indicated on the record "that intrusion into a private home was ipso facto sufficient to demand capital punishment when the resident was killed." Id. at 815; the federal court indicated a fear that the sentence was imposed as a result of the arbitrary judgment of one individual.

The facts of the instant case are best summarized as follows: Appellant and his accomplice planned a crime for the purpose of material benefit; they carried weapons to overcome any resistance they might meet. During the commission of their crime they encountered resistance or interference; they attempted to kill both of those who sought to halt their crime; and they did actually kill one of those who interfered.

In Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977), the defendant and a friend had planned to burglarize the victims' home but were surprised when they entered the house and

subsequently murdered both the mother and daughter residents. In Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971), the death sentence was imposed on a defendant who was surprised by the residents and ultimately shot both husband and wife through the head. In Callahan v. State, 229 Ga. 737, 194 S.E.2d 431 (1971), the victim/police officer was murdered brutally when he responded to a burglar alarm.

Despite Petitioner's contentions that the "similar cases" cited by the Georgia Supreme Court in the Appendix were factually more brutal or gruesome than the facts of the instant case, he fails to take into account the non-statutory aggravating circumstances of Petitioner's extensive criminal record.

Based on the foregoing, Respondent submits that the Georgia Supreme Court adequately conducted the statutorily required sentence review.

II. PETITIONER'S STATUS AS A HABITUAL
VIOLATOR, FOR PURPOSES OF HIS
CONTEMPORANEOUS BURGLARY CONVICTION,
WHICH REQUIRED A TWENTY YEAR SENTENCE
WITHOUT PAROLE, DOES NOT CONSTITUTE
A MITIGATING CIRCUMSTANCE.

Petitioner contends that he should have been allowed to argue, as a mitigating factor, that the trial court would be required to sentence him as a habitual offender to twenty years imprisonment on the burglary convictions and that there would be no possibility of parole. Petitioner argued to the trial court that he should have been allowed to make this argument without it being revealed to the jury that he could, under the earned time system, receive up to one-half off that sentence.

For several reasons, Petitioner's reasoning is unpersuasive. First, an argument as that which Petitioner proposed to make, clearly violated O.C.G.A. § 17-8-76; Ga. Code Ann. § 27-2206 which precludes mention of parole during closing argument before a jury and has been interpreted by the Georgia Supreme Court to include arguments regarding a defendant's inability to make parole. See Golden v. State, 213 Ga. 481, 99 S.E.2d 882 (1957). Second, that Petitioner would serve a term of years without the possibility of parole is not a mitigating factor.

Mitigating circumstances have been defined by this Court as "circumstances not constituting justification or excuse for the offense in question, 'but which in fairness and mercy, may be considered as extenuating or reducing the degree' of moral culpability or punishment." Coker v. Georgia, 433 U.S. 584, 590-91 (1977). And, in Lockett v. Ohio, 438 U.S. 586, 604 (1978), this Court stated "[W]e conclude that the Eighth and

Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original). In a footnote this Court added, "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 604 n.12. Because the unavailability of parole during the instant Petitioner's burglary sentence is not an aspect of his character, record, or offense, it is not a mitigating circumstance.

Finally, Respondent would submit that any argument pertaining to the term of imprisonment to be imposed on Petitioner by the trial judge as to his burglary convictions should not be addressed to the jury while considering the sentence to be imposed on the murder conviction.

Accordingly, Respondent maintains that the trial court and the Georgia Supreme Court properly determined that Petitioner should not argue his inability to make parole on the burglary sentences to the jury during the penalty phase.

III. O.C.G.A. § 17-10-30(b)(2); GA.

CODE ANN. § 27-2534.1(b)(2)

IS CONSTITUTIONAL.

Petitioner contends that imposition of the death penalty pursuant to O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) as it applies to the offense of murder being committed while the offender was also engaged in the commission of a burglary, is unconstitutional. Petitioner argues that such circumstances do not reflect a "consciousness materially more depraved" than those of the "ordinary murder."

The Georgia Supreme Court properly determined that "depravity" is not a component of the (b)(2) statutory aggravating circumstance. The discussion regarding depravity in this Court's opinion in Godfrey v. Georgia, 446 U.S. 420 (1980) pertained exclusively to the (b)(7) aggravating circumstance and this Court's concern that that provision did not provide sufficiently objective standards for the jury's consideration of the death penalty.

Of course, the jury was clearly instructed that their finding beyond a reasonable doubt the existence of the (b)(2) aggravating circumstance as it relates to burglary did not compel imposition of the death sentence. The sentencer must still "consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law," O.C.G.A. § 17-10-30(b); Ga. Code Ann. § 27-2534.1(b), regardless of the comparative weight of the aggravating and mitigating circumstances, the setencer may extend mercy and impose a life sentence.

In addition to finding the (b)(2) aggravating circumstance, the jury was authorized to consider Petitioner's extensive criminal record as a non-statutory aggravating circumstance;

this in combination with the fact that Petitioner was unable to present any substantial mitigating factors, apparently persuaded the jury that a death sentence should be imposed.

In addition, Respondent would note that Georgia's statutory scheme for imposition of the death penalty has been held constitutional by this Court. Gregg v. Georgia, 428 U.S. 153 (1976).

Based on the foregoing, Respondent submits that O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2) is not unconstitutional either on its face or as applied in Petitioner's case.

IV. THE TRIAL COURT PROPERLY CHARGED
ON MITIGATING CIRCUMSTANCES.

Petitioner contends that the trial court's charge during the sentencing phase failed to guide and channel the jury's consideration of mitigating circumstances of the particular offense and the offender.

Regarding mitigation, the trial court charged the jury as follows:

I charge you that in all cases for which the death penalty may be authorized, the law provides that the judge shall instruct the jury concerning mitigating circumstances or aggravating circumstances which the jury may consider in making the decisions which will determine the punishment to be imposed for this offense.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

* * *

Now, I charge you that the defendant contends that mitigating circumstances exist in this case. And in that

connection, I charge you that in arriving at your verdict in this case you will consider evidence as to the mitigating circumstances which the defendant contends exists in this case.

(Trial transcript, pp.1112-14). The trial court also clearly instructed the jury that it could recommend mercy without any reason, even if it found one or more statutory aggravating circumstances. (Trial transcript, pp.1114-17).

Respondent submits that the above-cited charge fully comports with the guidelines established by this Court and by the federal appellate courts:

. . . the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . ." Jurek v. Texas, 428 U.S. at 274 (96 S.Ct. at 2957). In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is⁸

and what its function is in the jury sentencing deliberations.

8/ The Constitution does not require the use of the words "mitigating circumstances." So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment

...
Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981). Respondent is aware of no requirement that the trial court enumerate factors which might be considered as mitigating in the charge.

Based on the foregoing, Petitioner's final argument presents no issue warranting review by this Court because the trial court properly instructed the jury regarding the definition and function of mitigating circumstances during the penalty phase.


CONCLUSION

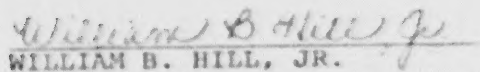
For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Jimmy Lee Horton.

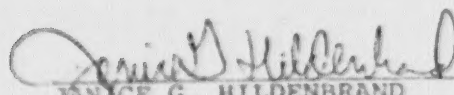
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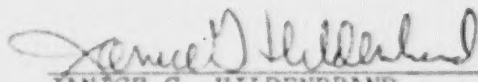
CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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